

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

April 10, 2004

In Reply Refer To:
1800B3-GDG

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In re: WDHC(FM), Berkeley Springs, WV
Facility ID No. 68204
BPH-20000907ADI

Dear Counsel:

This letter concerns the request, filed January 19, 2004 and amended February 2, 2004 on behalf of Capper Broadcasting Company ("Capper"). Capper seeks additional time to modify the licensed facilities of WDHC(FM), Berkeley Springs, West Virginia. For the reasons detailed below, Capper's request is granted to the extent discussed below and denied in all other respects.

On February 21, 2001, the staff granted Capper's permit to relocate the station's transmitting antenna. The permit specified a three-year term expiring February 21, 2004.¹ Capper claims that the three-year period was encumbered for 110 days (October 7, 2003 – January 26, 2004) while the Circuit Court of Morgan County, West Virginia ("Circuit Court") considered litigation filed by the Morgan County Planning Commission against Capper. Capper claims that the court case terminated with the Court's January 26, 2004, order to dissolve an injunction that had prevented Capper's construction.

The Commission's rules provide for the tolling of construction permits for actions before a court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the station, including any zoning or

¹See *Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23090 (1998), *recons. granted in part and denied in part*, 14 FCC Rcd 17525 (1999) ("Streamlining MO&O"). See also 47 C.F.R. §73.3598(a).

environmental requirement.² A notification that a permit is subject to such matters must be filed within 30 days of the pertinent event.³

Litigation before the Circuit Court commenced October 7, 2003, with most matters resolved in a December 4, 2003, Order. Capper concedes that its January 19, 2004, notification is untimely and that its awareness of the Commission's tolling requirements did not extend to the rule's procedural stipulations.⁴ Further, Counsel advises the staff that Capper did not advise it of the relevant litigation until January 5, 2004.⁵

Interested parties have had constructive notice of the Commission's revised construction period rules since December 18, 1998.⁶ Ignorance of these rules does not warrant waiver of the tolling notification rule. The staff may, however, waive the broadcast construction period rule when "rare and exceptional circumstances" beyond a permittee's control prevent completion of construction.⁷ Within the 30 days preceding Capper's January 19, 2004, notification, Capper remained enjoined from construction due to a Court-issued injunction.⁸ The injunction was not lifted until January 26, 2004. The injunction was beyond Capper's control, issued in part because the County improperly applied a Wireless Telecommunications Facilities Ordinance that was void *ab initio*.⁹ We will waive 47 C.F.R. § 73.3598(a), the construction period rule, to compensate Capper for the 38-day period between December 19, 2003, and the dissolution of the injunction on January 26, 2004.

Accordingly, Capper's "Request to Toll Construction Permit" IS GRANTED to the extent discussed above and IS DENIED in all other respects. Given that the injunction extended almost until the permit's expiration date, and the expiration date has now passed, we will begin to count Capper's 38 days from the date of this decision. Capper must complete construction and file a covering broadcast license application no later than May 17, 2004. Given this brief extension of time to construct its authorized facilities, we urge Capper to proceed expeditiously. In the event construction is not completed by May 17, 2004, we remind Capper of its ability to file a future application

² See 47 C.F.R. § 73.3598(b)(ii).

³ See 47 C.F.R. § 73.3598(c). The same 30-day period applies to waiver requests. See *Birach Broadcasting Corporation*, 18 FCC Rcd 1414, 1416 (2003).

⁴ *Request* at 2.

⁵ *Id.*

⁶ 63 FR 70050 (Dec. 18, 1998).

⁷ *Streamlining MO&O* at 17541.

⁸ Although the injunction took effect on December 4, 2003, we can, due to Capper's late notice, recognize only the portion of the injunction in effect from December 19, 2003, onward.

⁹ *Morgan County Commission v. Capper*, Case No. 03-P-15 at 36 (Cir. Ct. Morgan, WV Dec. 4, 2003).

for minor change to WDHC's licensed facilities. Grant of such an application could start a new full three-year period to construct.

Sincerely,

Peter H. Doyle, Chief
Audio Services Division
Mass Media Bureau